
Introduction: The Challenge of Human Rights Implementation

1.1 Introduction

The world's first ever gathering of women Muslim clerics (*ulama*) was held for three days in April 2017 at an Islamic Boarding School in Cirebon, West Java, Indonesia. Hundreds of participants, including both female and male *ulama*, academics, journalists and activists, attended the National Congress of Female Muslim Clerics, an event years in the making.¹ While most participants were Indonesian, foreign representatives were also present from countries including Saudi Arabia, Pakistan, India, Nigeria and Kenya. Addressing themes such as 'Amplifying Women Ulama's Voices, Asserting Values of Islam, Nationhood and Humanity', the Congress sought to recognise and celebrate female *ulama*, and to address pressing issues facing women such as sexual violence, religious extremism, child marriage and polygamy. While addressing these serious issues, the Congress was also an opportunity and space for women *ulama* to develop contacts, build networks and share experiences. The Congress included cultural and musical performances and even provided reproductive healthcare services to participants.

At the Congress, the *ulama* issued rare religious rulings (*fatwas*) against child marriage, sexual violence and environmental destruction. Simply issuing the *fatwas* was an historic act, as male *ulama* have typically monopolised this exercise. The Indonesian Ulama Council (*Majelis Ulama Indonesia* – MUI), one of the main bodies in Indonesia

¹ See the official website (in Bahasa Indonesia) of the Congress (Kongres Ulama Perempuan Indonesia) <https://kupi-cirebon.net> (accessed 14 November 2017). Select parts of this introduction were published as Julie Fraser, In Search of New Narratives: The Role of Cultural Norms and Actors in Addressing Human Rights Contestation, in Rosemarie Buikema, Antoine Buyse and Antonius Robben (eds.), *Cultures, Citizenship and Human Rights* (Routledge, 2019), pp. 175–95; Julie Fraser, Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law (2019) *The International Journal of Human Rights* 23:6, pp. 974–92.

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that issues *fatwas*, is comprised almost entirely of men.² The Congress' *fatwas* are therefore an important symbol of the women *ulamas*' religious authority. The *fatwa* against child marriage is all the more noteworthy given that MUI and other Islamic institutions continue to support child marriage, which has long been legal under Indonesian State law despite being contrary to international human rights law.³ Child marriage is widespread across Indonesia, which has one of the highest number of child brides worldwide, with one in seven girls married before they turn 18.⁴ In their *fatwa*, the women *ulama* argued for the minimum age for legal marriage to be set at 18 years for girls, and urged the Government to raise the current age from 16. While the *fatwa* (like all *fatwas*) is not legally binding, it holds great authority in Indonesia, the country with the largest Muslim population in the world. At its conclusion, the Congress presented their recommendations to Indonesia's Minister of Religious Affairs, on behalf of the Government.

This remarkable Congress was an initiative of Indonesian Muslim women who sought to counter male authority in Islam and the dominant male interpretations of Islamic law. Their strategy is to achieve this by 'strengthening the expertise and knowledge of female ulama, networking among them, affirmation and appreciation of their work, as well as strengthening their cultural existence'.⁵ In their deliberations and argumentation at the Congress that gave rise to the *fatwas*, the women *ulama* used classical Islamic texts, including the *Qur'an* and the *Hadith* (the Prophet's sayings or statements). However, they also relied upon the Indonesian 1945 Constitution and international law, including the *Universal Declaration on Human Rights* (UDHR).⁶ This is a prime example of how international human rights can be used by diverse groups in diverse ways. It shows how various actors beyond the state

² Nor Ismah, *Destabilising Male Domination: Building Community-Based Authority among Indonesian Female Ulama* (2016) *Asian Studies Review* 40:4, p. 491.

³ See Indonesian Marriage Law No. 1 of 1974, article 7.

⁴ UN Human Rights Council, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health on His Mission to Indonesia, A/HRC/38/36/Add.1 (5 April 2018), paras. 91–2.

⁵ Kongres Ulama Perempuan Indonesia, *Amplifying Women Ulama's Voices, Asserting Values of Islam, Nationhood and Humanity*, <https://kupi-cirebon.net/international-forum-women-ulama/> (accessed 15 November 2017).

⁶ Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A(III) (UDHR).

are involved in the promotion and protection of human rights, and how they legitimise human rights in context by reference to social institutions like religion.

In fact, the following year, in December 2018, the Indonesian Constitutional Court unanimously ruled that the current legal age of 16 years for girls to marry was unconstitutional.⁷ The case had been brought by three wives who had been pushed into childhood marriages and forced to quit school. The Court held that child marriage violated the Constitution's protection of a girl's right to education and to a healthy life, and that the differences in ages for boys and girls was discriminatory. Importantly, the Court referred to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)⁸ and to bringing Indonesian law into line with its international obligations. This decision is all the more remarkable, given that the same Court only three years earlier had declined to overturn the marriage age for girls.⁹ Intervening in this period was the women *ulama's fatwa* against child marriage. While it is unclear exactly how much of an influence it had on the Constitutional Court's decision-making, given the authority of *fatwas* within Muslim communities, it is hoped that it may also succeed in curbing the high prevalence of child marriages in practice.

As this example shows, while vitally important to have international human rights law and the minimum standards as espoused in the numerous and growing treaties, it is the way the law is operationalised that makes an impact on people's lives. Without action at the national level, international human rights treaties are empty promises or 'dead letters'.¹⁰ As such, the heart of human rights protection lies not in the creation or existence of international treaties, but in their domestic implementation.¹¹ However, the mismatch between treaty ratification and implementation 'is one of the most glaring shortcomings of the

⁷ Indonesian Constitutional Court, Decision Number 22/PUU-XV/2017 relating to applicants Endang Wasrinah, Maryanti and Rasminah (13 December 2018). The Court gave the Indonesian Government three years to amend the Marriage Act appropriately.

⁸ See section 3.16 of the Constitutional Court's judgment *ibid.* *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13 (CEDAW).

⁹ Indonesian Constitutional Court, Decision Number 30-74/PUU-XII/2014 (2015).

¹⁰ Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?* (2007) *Journal of Conflict Resolution* 51:4, p. 592.

¹¹ Rhona K. M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2012), p. 177.

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international human rights system'.¹² Therefore, this book addresses the pressing contemporary challenge of human rights implementation, which has been highlighted by UN Secretaries-General, High Commissioners for Human Rights, States and scholars.¹³ It is through domestic action, like the women's Congress in Indonesia, that international human rights obligations can be transformed into reality. This action can and must take various forms.¹⁴ Having established the framework of international human rights law, 'the ball is now in the court of the States and other international players to ensure its effective realization and implementation'.¹⁵ While there is a role for international actors, like the UN treaty bodies, states are primarily responsible for the domestic implementation of international human rights treaties. This is a result of the state being designated as the principal duty-bearer in the treaties, and is connected to issues of sovereignty and consent in international law.

By ratifying the treaties, states undertake to respect and ensure to everyone in their jurisdiction the rights protected therein.¹⁶ They are obliged to take all necessary steps to give effect to the rights by enacting legislation or undertaking other measures in political, economic, social and cultural fields.¹⁷ While the treaties set out the standards to be

¹² Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press, 2013), p. 88. See also Michael Freeman, Putting Law in Its Place: An Interdisciplinary Evaluation of National Amnesty Laws, in Saladin Meckled-García and Başak Çali (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2006), p. 50.

¹³ See, for example, Mary Robinson, From Rhetoric to Reality: Making Human Rights Work (2003) *European Human Rights Law Review* 2:1, pp. 1–8; Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, 2002), p. 1; Jean-Philippe Thérien and Philippe Joly, 'All Human Rights for All': The United Nations and Human Rights in the Post-Cold War Era (2014) *Human Rights Quarterly* 36:2, pp. 380–1, citing UN Secretary-General, Report of the Secretary-General on the Work of the Organization, Delivered to the UN GA, A/62/1 (31 August 2007), para. 80; Office of the High Commissioner for Human Rights, Annual Report 2008: Activities and Results (30 April 2009) p. 5, www.ohchr.org/Documents/Press/OHCHR_Report_2008.pdf (accessed 14 November 2017).

¹⁴ Ineke Boerefijn, International Human Rights in National Law, in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Turku/Åbo: Åbo Akademi University, Institute for Human Rights 2009), p. 577.

¹⁵ Smith (n. 11), p. 35.

¹⁶ See, for example, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR), art. 2(1); *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3 (CRC), art. 2(1).

¹⁷ See, for example, ICCPR, art. 2(2); CRC, art. 4; CEDAW, arts. 2 and 3.

achieved, they typically do not prescribe the methods by which to do so, as illustrated by the vague obligation to undertake ‘other measures’ of implementation.¹⁸ As a general rule, states enjoy discretion as to how they implement a treaty in their domestic order – unless the treaty specifies implementing modalities.¹⁹ This reflects the fact that the treaties uphold sovereignty and defer to the state to determine and implement the measures that will be most effective in context. While sovereignty has been deemed the ‘Achilles heel’ regarding the enforcement of the international human rights system,²⁰ it can be seen as better suited at the implementation stage. This is because implementation measures need to be contextualised in order to be effective, rather than simply one-size-fits-all. States are inherently well-placed to tailor implementation measures to suit their own national context.

This state discretion and tailoring of implementation measures are intrinsic parts of the system of international human rights law. While the human rights standards established in the treaties are to be enjoyed universally, the methods of state implementation do not need to be uniform.²¹ Nor, in fact, should they be. The astounding diversity across the world’s almost two hundred states rebuts any presumption of uniformity. The international system accommodates this diversity via multiple mechanisms, and this inclusiveness reaffirms the universal application of human rights. One of these mechanisms is state discretion in implementation, which can be used to accommodate diversity both between as well as within states.²² For example, due to the cultural

¹⁸ See, for example, ICCPR, art. 2(2); CRC, art. 4; CEDAW, art. 2.

¹⁹ UN Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (29 March 2004), paras. 4, 13.

²⁰ Sarah Joseph and Joanna Kyriakakis, The United Nations and Human Rights, in Sarah Joseph and Adam McBeth (eds.), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010), p. 1.

²¹ Cees Flinterman, The Universal Declaration of Human Rights at 60 (2008) *Netherlands Quarterly of Human Rights* 26:4, p. 482; Eva Brems, Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam (2004) *Human Rights Review* 5:3, p. 13.

²² Yvonne Donders, Human Rights: Eye for Cultural Diversity, Inaugural Lecture delivered upon the appointment to the chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam (29 June 2012), pp. 18–19. Other mechanisms to accommodate diversity in international human rights law include subsidiarity, limitation clauses, exhaustion of domestic remedies, and the margin of appreciation: David Kinley, Bendable Rules: The Development Implications of Human Rights

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dimension²³ of almost all human rights, states must tailor their implementation measures to each context, with the result that measures may not be applicable let alone replicable elsewhere. According to the UN treaty bodies responsible for supervising states parties' implementation of the treaties, the controlling criteria for implementation measures is that rights are *effectively* protected – a duty of result not conduct.²⁴ It is the intention of the treaties, and therefore central to the work of the treaty bodies, that human rights are meaningfully enjoyed in practice, and not just protected in theory. Human rights make little sense if they only exist in the books.²⁵

Despite broad treaty ratification and discretion in the system for the tailored domestic implementation, every state struggles to guarantee human rights to varying degrees. The gap therefore becomes apparent between the concept of rights and practice; between the norms and their implementation. There are various reasons for this gap, including limited political will and economic resources, as well as the disconnect between international human rights law and some cultural norms around the world. In the treaties, human rights are formulated as general and abstract principles as a compromise to ensure their universal application and to avoid bias towards any particular tradition. However, such framing does not directly or necessarily evoke the lived experiences and worldviews of many of their beneficiaries. In fact, in many places, human rights are perceived as foreign impositions separate from – or even at odds with – local cultural norms and values. On this basis, human rights are often rejected, sometimes explicitly in the name of culture. Since the drafting of the UDHR, this issue of cultural relativity has plagued debates on the universality of human rights. As this indicates, international human rights suffer from a legitimacy deficit in many communities, with 'battles for the universal recognition of human rights . . . nowhere near won'.²⁶

Pluralism, in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012), pp. 51–3.

²³ Donders, *ibid.*, p. 17; Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014), pp. 123, 152.

²⁴ Oscar Schachter, The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights (1979) *The American Journal of International Law* 73:3, p. 462.

²⁵ Eva Brems, *Human Rights: Universality and Diversity* (Nijhoff, 2001), p. 311.

²⁶ Radhika Coomaraswamy, The Contemporary Challenges to International Human Rights, in Scott Sheeran and Sir Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (Routledge, 2013), p. 139.

Therefore, abstract international human rights norms need to be brought down-to-earth and made meaningful to the diverse communities in states parties. Human rights need to be (re)connected to the various foundations of rights in the world's traditions, including religion, custom and philosophy. If this can be achieved and local narratives of human rights embraced, people may come to support human rights 'as prerogatives that their own culture attributes to all members of the community'.²⁷ This task can be seen as part of the obligation on states parties to domestically implement human rights. And, as seen in the Indonesian example, social institutions like religion can also play an important role. In this way, rights can be effectively implemented by both public and private actors, tools, norms and resources – legislative and 'other measures'. After all, as proclaimed in the UDHR's preamble, 'every organ of society' is responsible for the 'universal and effective recognition and observance' of human rights. Involving locally embedded social institutions like religious groups and leaders can help ensure that rights are both communicated and implemented in culturally appropriate ways. This will not only facilitate their adoption in the community, but also demonstrate due respect to culture and counter some of the cultural relativist critiques of human rights. Such an approach is pragmatic, as it can be effective in securing rights, as well as principled in its respect for cultural diversity.²⁸

1.2 Countering Legalism, State-Centricity and Cultural Disconnect

While states parties have broad discretion in the measures they can take to implement their international human rights treaty obligations, legislation is the primary measure emphasised by the UN treaties, treaty bodies and literature. Some treaty articles specifically require legislation, such as article 2(a) CEDAW, which obliges states 'to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation'. In addition, the treaty bodies routinely recommend states parties to legally incorporate the treaties domestically, and much of the literature on implementation focuses almost entirely on legal

²⁷ Lenzerini (n. 23), p. 218.

²⁸ Julie Fraser and Henrike Prudon, Integrating Human Rights with Local Norms: Ebola, Burial Practices, and the Right to Health in West Africa (2017) *Intercultural Human Rights Law Review* 12, p. 72.

incorporation. Undoubtedly, legal incorporation can be a way to protect rights, formally enshrining them as state norms, making them binding nationally, and providing a framework for their domestic enforcement. While legislation may sometimes be sufficient to protect rights, it may also prove insufficient in practice. A survey of the Human Rights Committee's Concluding Observations revealed numerous gaps between states parties' constitutional guarantees and the reality of human rights violations.²⁹ Legislation may be ineffective for various reasons such as a lack of awareness of the law or its poor enforcement due to limited resources. While sometimes being impotent in these ways, legislation can also be counter-productive, particularly where it conflicts with local cultural norms.³⁰ As such, it is argued that the efficacy of legal incorporation (especially in isolation) has been oversold.

Noting the strong focus on and prioritisation of legal incorporation, some scholars have critiqued such legalism in the international human rights system on several grounds. The 'legalisation' of human rights refers to 'the practice of formulating human rights claims as legal claims and pursuing human rights objectives through legal mechanisms'.³¹ The default focus on state law has had numerous implications for human rights, including overshadowing other implementation methods that may be similarly or even more effective in practice. For example, legalism has entrenched law as the primary disciplinary lens through which to analyse and understand human rights, to the exclusion or diminution of other relevant social sciences such as politics, sociology and anthropology.³² Insights from these disciplines could enhance the understanding of human rights in context as well as their interrelationship with other

²⁹ Smith (n. 11), p. 49.

³⁰ For example, the Indonesian Government withdrew its legislative ban on medically performed female genital mutilation/cutting (FGM/C) due to backlash by Islamic leaders and *fatwas* against the prohibition. See UN CEDAW Committee, Consideration of reports submitted by States parties under article 18, Combined sixth and seventh periodic reports of States parties: Indonesia, CEDAW/C/IDN/6-7 (7 January 2011), paras. 132, 152; UN CEDAW Committee, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Indonesia, CEDAW/C/IDN/CO/6-7 (7 August 2012), paras. 21-2; UN Human Rights Committee, Concluding Observations on the initial report of Indonesia, CCPR/C/IDN/CO/1 (21 August 2013), para. 12.

³¹ Jack Donnelly, The Virtues of Legalization, in Saladin Meckled-García and Başak Çali (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2006), p. 67.

³² Koen de Feyter, Law Meets Sociology in Human Rights (June 2011) *Development and Society* 40:1, p. 51.

social forces.³³ This understanding could aid in determining the implementation methods most likely to be effective in practice in a given context. A central critique, therefore, of legalism in human rights is that a preoccupation with the law can lead to a disinclination to acknowledge the law's limitations. Viewing human rights problems only through a legal framework fails to consider solutions that may lie outside the law, or to recognise that the law may not be able to present a suitable remedy at all.

Due to this legalism, ample attention has been devoted to the formal role of the state and legal measures such as incorporation, with less attention directed to non-legislative or 'other measures' of implementation. As noted above, the treaties only vaguely refer to other measures without providing an elaboration thereof, and scholarship has not comprehensively elucidated what such measures may (or may not) entail. The variety and role of other measures have therefore been under-explored and under-exploited. As a result, there is not a clear understanding of the nature and scope of these other measures and their potential efficacy in practice, as the UN treaty bodies, state policymakers, academics and others continue to focus predominantly on state legislative measures. This is both a function and reinforcement of legalism in human rights, as well as state-centricity. A contribution of this book is therefore its examination and articulation of 'other measures' for domestically implementing human rights.

Another aspect of legalism in human rights is that it necessarily focuses on the state as the legislator and enforcer. Casting state law as *the* law recognises only the modern state model and marginalises other plural legal systems beneath and beyond the state that exist in virtually all countries in the world.³⁴ Numerous scholars have critiqued the state-centric nature of international human rights law, questioning its contemporary ability to effectively protect rights in context. This is largely due to the shifting role of the state due to phenomena including globalisation and privatisation. While state law and courts can be effective in implementing rights, a multiplicity of other actors and tools can also be effectively employed. As recognised in the UDHR and by the UN

³³ Denis Galligan and Deborah Sandler, Implementing Human Rights, in Simon Halliday and Patrick Schmidt (eds.), *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart Publishing, 2004), p. 25.

³⁴ William Twining, Legal Pluralism 101, in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012), p. 114; Brian Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global (2008) *Sydney Law Review* 30, p. 375.

treaty bodies, non-state actors (NSAs) play a crucial role in human rights implementation and even have international responsibilities.³⁵ However, the focus of international human rights law on the state as the primary addressee and state law as the primary tool has eclipsed the role of other actors and norms. These non-state norms and actors can be important – even crucial – assets in effective human rights implementation. Scholars have identified the need to make space in international human rights law to better account for the role of NSAs, creating counter-narratives and debunking myths of the state.³⁶

Specifically, this book examines the role of informal social institutions (like kinship groups, religion and traditional healers) in other measures of human rights implementation. Social institutions are central in the development of complex social organisation and interaction, and – particularly important for human rights implementation – can efficiently guide and shape human behaviour. In this way, they can even be more potent than state law. As culturally embedded institutions, social institutions typically enjoy local legitimacy, which foreign norms like human rights often lack. Despite these benefits, the role of social institutions in human rights implementation is under-theorised. While the negative role of cultural norms and actors, and particularly religious ones, in abusing rights has been the subject of much scholarship (for example, regarding female genital mutilation/cutting (FGM/C), polygamy, denying women's franchise etc.), their positive role in implementing and protecting rights has received less attention. In fact, the international discourse around culture in human rights tends to essentialise and 'other' culture. As such, another contribution of this book is its analysis of the positive role of culture and social institutions in the domestic implementation of international human rights law from a legal and practical perspective.

In fact, some contend that, as originally conceived in the UDHR, human rights were never intended to be so legalistic or state-centric.³⁷

³⁵ See further Chapter 4.

³⁶ Manisuli Ssenyonjo, Non-State Actors and Economic, Social, and Cultural Rights, in Mashood Baderin and Robert McCorquodale (eds.), *Economic, Social, and Cultural Rights in Action* (Oxford University Press, 2007), pp. 109, 134; Cedric Ryngaert, Non-State Actors: Carving out a Space in a State-Centred International Legal System (2016) *Netherlands International Law Review* 63, p. 185, citing Mariana Valverde, *Chronotopes of the Law: Jurisdiction, Scale and Governance* (Routledge, 2015).

³⁷ Mary Ann Glendon, *A World Made New* (Random House, 2002), p. 161; Abdullahi Ahmed An-Na'im, The Spirit of Laws Is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights (2016) *Tilburg Law Review* 21, p. 274.